

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1997

To Be Argued By
BENJAMIN J. GOLUB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No: 74 Cr. 1997

UNITED STATES OF AMERICA,

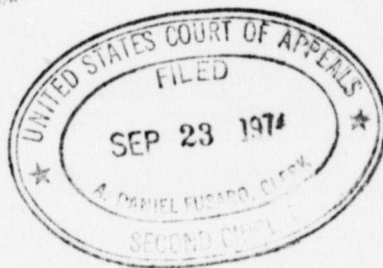
Appellee,

-against-

WILLIAM CRUZ-ARGUNZONI,

Defendant-Appellant.

APPELLANT'S BRIEF



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UNITED STATES OF AMERICA,

WILLIAM CRUZ-ARGUNZONI,

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weapons set forth in those counts to undercover agents and that the defendant received cash from the undercover agent for his participation in those two transactions.

The defendant in fact, took the stand and in effect, although alleging he was entrapped into doing so, admitted the essential elements of having given the weapon in Count I to the undercover agent and receiving cash for same and aiding and abetting others in doing so in Counts II and III.

The co-defendants, WILLIAM HERNANDEZ and GILBERTO TOBOADO-DeJESUS were acquitted at trial of aiding and abetting although their activities in Counts I, II and III were similar to this defendants' except for the sale in Count I.

Defendant's essential contention relates to the statutory construction of the statute in question and the Government's burden of proof with respect to various elements of that statute.

II. ISSUES PRESENTED

The issues presented on this appeal are as follows:

1. Is the statute in question constitutional. That is, does the statute create the situation in which even if the defendant sought to comply with the elements of the statute under which he was convicted, the balance of the statute is so structured so as to make it legally impossible for the defendant to do so and therefore, the statute is unconstitutional; and additionally, was it reversible error for the Court to deny the defendant's offer of proof with respect to his impossibility to comply with the provisions of the statute; and, further, was it reversible error for the court to

deny defendant's request for a charge concerning the impossibility of his compliance with the statutory requirements.

2. Does the statute in effect make it impossible for the Government to take possession of the weapons in question in this indictment as transferee, and therefore, since no "transfer" could technically occur, no statutory violation took place.

3. Does the element of "willfully and knowingly" in the indictment refer to the statutory elements of the crime as well as just the physical giving over of the weapon to the undercover agent for cash; if so, did the Government wholly fail to prove or even attempt to prove any element of knowledge of the statute or its willfull violation; and, did the Trial Court commit reversible error in failing to charge the jury with respect to knowledge of the statute and its willfull violation as the defendant had requested.

4. The statute provides that "antique" guns are not covered by the statute. Thus, an element of the crime must be proof that the guns are not antique. The Government had the burden of proof to show that these guns were not antique and were covered by the terms of the statute. That issue is whether or not the Government met its burden to prove that element of the crime.

5. The statute in question provides that the sale of weapons as were involved in this indictment, to a Government agency, are exempt from the statute. The issue involved is whether or not the sale involved in this indictment was technically exempt from the statute since it was a transfer to a Government agency, albeit an undercover agent.

POINT I

THE STATUTE IS UNCONSTITUTIONAL

This statute is unconstitutional for one simple reason. Title 26 U.S.C. Section 5811 provides for a transfer tax to be levied, collected and paid on firearms, covered by 26 U.S.C. Section 584 which are transferred. Thus, had the tax required been paid the defendant would not have committed any of the crimes charged except for the fact that 26 U.S.C. Section 5812 provides that:

"(a) application.- A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidence by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may be by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulation prescribe; (5) the firearms is identified in the application form in such manner as the Secretary or his delegate may by regulation prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of Possession.- The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee as required by Subsection (a) of this Section.

Defendant was charged with violating both Section 5811 and 5812.

The Defendant did not pay the tax on the transfer albeit the Trial Court did not permit any questions with respect to the defendant's

attempt to pay the tax after the indictment (R-327).

However, the prerequisite for the defendant's conviction is that the firearms in question were never registered. If they were registered and the tax had been paid, no crime would have been committed. The Government's own expert witness, JAMES B. CAIN, who was "a firearms enforcement officer" and "one of the custodians of the National Firearms Registration and Transfer record," (R-180) testified as follows:

Q. (BY MR. GOLUB) Is it possible to register a gun where there is no record of the gun?

A. THE COURT: He (MR. GOLUB) is asking now, in the Mrs. Ashby situation (Mrs. Ashby was a juror who was being used by the Court to illustrate that and stand in the position of a transferee) if I want to turn over the gun to Mrs. Ashby and you say it isn't registered, you just said I would have to register it, is that correct?

THE WITNESS: That is correct. The registration comes first before anything else.

Thus, registration came before anything else. In order to pay the tax and legally transfer the weapons, the weapon would first have to be registered. However, the difficulty with the Statute and the reasons for its unconstitutionality because it violates due process is because it was impossible for the defendant to register the weapons; the Government itself would not have permitted registration of the weapons in question. Thus, we are faced with a classic "catch-22" situation. This defendant is being prosecuted by the Government for violating a statute in failing to register a firearm, and in aiding and abetting others who have failed to register firearms, while at the same time the Government would not allow the firearm to be registered. CAIN, the Government expert witness, testified that with

respect to the guns in question:

"We (the Government) wouldn't allow the transfer to be made, it (the firearm) would have to be registered first before it could be transferred." (R-190).

Thereafter, at pages 190-194, there was considerable discussion with respect to the registration requirements and upon whom the burden of registration was placed.

The Government's witness was asked if it was "possible" to register the gun if the gun had never been previously registered, but the Court continued to frustrate all of the defendant's counsel's efforts to have that simple question answered. The trial record at pages 193-194 sets forth continued attempts by defendant's counsel to ascertain whether or not the guns could physically be registered in the condition they were in, by the defendants. The Court consistently refused to permit an answer to that question by either rephrasing the question or answering the question on its own in place of the witness.

Thus, the Trial Court did not allow the crucial question of whether or not the defendant could have possibly registered the gun to be answered.

Thereafter, the defendant's counsel made an offer of proof with respect to the testimony that the Government's expert, CAIN, would have answered with respect to that question concerning the ability to register the firearms that the firearms were not capable of being registered. That discussion takes place on the record at pages 293-295. The application on the offer of proof was denied.

It is respectfully submitted that the denial of this offer of proof was reversible error, for if the testimony of the Government's

expert would have been that the gun could not physically be registered then the statute would have been unconstitutional because there is no possible way for the defendant to comply with the statutory requirement of registration; and if the gun could not be registered, the gun could not be transferred.

The Government on that argument took the position, with which the Court indicated that it agreed, that it was "illegal to come into possession of it (the gun)". Unfortunately for the Government this defendant was never indicted or charged with illegal possession of a firearm covered by the statute; it is in fact a crime; it is covered by 26 U.S.C. 5861 (c); this defendant was charged with a violation of 26 U.S.C. 5861(e). To speculate on whether or not the defendant was guilty of that crime as the United States Attorney requested the Trial Court to do, is totally meaningless and has absolutely no bearing on the issues involved in this case and the statutory violations charged.

To reiterate, the simple fact of the matter seems to be that the statutory requirement is one that requires registration of the firearm. Yet the Government makes it impossible to register the firearm because according to the Government's witness as stated in the offer of proof, if the weapons were not registered in the grace period after the passage of the statute, they were incapable of registration. That puts the defendant, not charged with the crime of possession, in an untenable position, in that he is prevented by the Government from curing an illegal act which would not have been illegal had the weapon been registered by a prior owner. The Government did not choose to

outlaw all such firearms; it permits the transfer of such firearms if the technical requirements are met. However, it gives the defendant no opportunity to meet the technical requirements imposed.

It is also respectfully submitted that the Court further committed reversible error in refusing the defendant's request to charge with request to the physical impossibility of registration of the firearms as requested by the defendant's counsel (R-419).

The defendant undoubtedly, if charged with possession under 26 U.S.C. 5861(c) could have asserted the self incrimination protection set down by the Supreme Court's decision in HAYNES v. U.S. 390 U.S. 85, 19 L. Ed 2d 923, 88 S. Ct. 722, (violation of Section 265.05 Penal Law of the State of New York, among others). In order to transfer the weapon Defendant would have had to go through the same incriminatory procedures, (to no avail, either because it was impossible to comply with the law and register the weapons, which issue was raised at trial). The Government attempts to get around this by not charging the crime of "possession" but of transfer. The Government should not be entitled to go through the back door to obtain a conviction in this manner since the Government makes it physically impossible to register the weapons in question. This situation is certainly worse than possible self-incrimination. Self-incrimination is only a risk. Here the Government created an absolute bar to any registration and thus created this situation where the defendant could only continue to be in violation of the law. See also U.S. v. MILLER 406 F2d 110 (4th Cir. 1968) applying Haynes (supra) to registration and U.S. v. Schofer 310 F. Supp. 1292 (E.D.N.Y. 1969).

POINT II

NO TRANSFER TOOK PLACE UNDER
THE TERMS OF THE STATUTE AND
THEREFORE NO CRIME WAS COMMITTED

Title 26 U.S.C. 5812(b) provides that:

"The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by SubSection(a) of this Section."

The trial Court correctly pointed out that "The transferee here is the Government" (R-192). If that is so, then 26 U.S.C. 5812(b) prevents the Government (the transferee) from taking possession of the firearm; if the Government cannot legally take possession of the firearm under the language of the statute there has not been a "transfer" pursuant to the statute; if there has not been a "transfer" pursuant to the statute, then certainly the defendant cannot be guilty of the crime of "transferring a firearm" without having registered same. Any other view has no logical or rational basis whatsoever.

POINT III

WILLFULLY AND KNOWINGLY ARE ELEMENTS
OF THE CRIME AS SET FORTH IN THE
INDICTMENT; THOSE TERMS REFER TO
KNOWLEDGE OF THE STATUTE IN QUESTION
AND WILLFULL VIOLATION THEREOF; NO
SUCH KNOWLEDGE OR WILLFULLNESS WAS
PROVED AND THE GOVERNMENT DID NOT
MEET ITS BURDEN OF PROOF; THE TRIAL
COURT COMMITTED REVERSIBLE ERROR IN
FAILING TO CHARGE THE JURY ON THE
ISSUE OF WILLFULLNESS AND KNOWLEDGE.

While this statute is not covered by Chapter 75 of 26 U.S.C. and more specifically Section 7201 and Section 7203 which make "willfullness" an element of a crime covered by Title 26, the Government has charged in the indictment that "knowledge" was an element of the crime. It is respectfully submitted that the Government is bound by its indictment and its requirement to prove knowledge but that even if the Government did not insert the words willfully and knowingly, into the indictment that knowledge of the statute must of necessity be an element of the crime charged; it was an element unproven by the Government and was not charged by the Trial Court. Thus, on the one hand, the Government did not meet its burden of proof on the question of knowledge and the Trial Court committed reversible error in its charge with respect to knowledge.

It was the testimony of the undercover agent, DIAZ, that he never advised the defendant of the existence of the tax statute; indeed, agent DIAZ testified that he had never even seen those sections of the law in question printed in Spanish (R-109, 110) and the defendant speaks almost no English.

Thus, there was a total failure of proof on the issue of whether or not the defendant had knowledge of the statute in question. The Government put in no evidence from which the jury could possibly conclude that the defendant had or could be presumed to have, knowledge of the statute.

The Trial Court itself admitted and stated to the jury

"He (the defendant) doesn't know there was a tax law" (R-326).

Again the Court relying on a concurring opinion in United States v. Freed 401 U.S. 601 declined to charge intent, quoting the concurring opinion in Freed (supra) that "anyone must be presumed to be aware of it in the context of a taxing and registration scheme." (R-419). But surely, any "presumption" to that effect is rebuttable and the Trial Court itself, as just pointed out above, found, that regardless of what "anyone must be presumed to be aware of" this defendant was not aware of the statute in question.

Gun sales of the type for which this defendant was indicted are not per se illegal; they do not carry the notariety of a narcotics' sale crime or a bank robbery, where, in fact, a "presumption" that a defendant knows that he has committing a crime is certainly valid. This defendant's alleged crime is contained in a complicated complex and technical statute hidden away in a section of the Internal Revenue Code, unknown probably to many lawyers, let alone this defendant. Had certain technical requirements been met, had the guns been of a little longer barrel length, the defendant's acts would not have been criminal.

To convict the defendant in the complete absence of any showing whatsoever, that he knew that the sale was a crime, or even any showing of any facts from which a jury could presume knowledge, its a total miscarriage of justice.

Knowledge is and must be an element of the crime; it was not proven; no facts whatsoever were submitted to even create the bearest possible presumption of knowledge; the Court committed reversible error in its charge to the jury on the element of knowledge. (R-503-504).

Moreover, Freed (supra) involved hand grenades. The Court said they were as dangerous as "drugs." Here this defendant grew up in a society where guns were more commonplace. Not one single iota of proof went ⁱⁿ on the Government's case, to show that this defendant had any possible knowledge of the illegallity of these transactions, or that they were in any way prohibited. In U.S. v. DeBartolo 482 F.2d 312 (1st Cir. 1973) the Court said at pg. 316:

"It is enough to prove he (defendant) knows he is dealing with a dangerous drug or a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation."

It is respectfully submitted that the Government did not show that this defendant had such knowledge.

POINT IV

THE GOVERNMENT HAS THE BURDEN OF PROOF THAT THE GUNS IN QUESTION WERE COVERED BY THE STATUTE; THEY DID NOT MEET THAT BURDEN. THUS, AN ELEMENT OF THE CRIME WAS NOT PROVEN. THE TRIAL COURT COMMITTED ERROR IN DENYING DEFENDANTS' MOTION TO DISMISS THE GOVERNMENTS' CASE ON THE ABOVE GROUND.

Title 26 U.S.C. Section 5811 clearly provides that the subject matter of the statute are "firearms". "firearms" are defined at 26 U.S.C. 5845. That Section provides that: "The term 'firearm' shall not include an antique firearm..."

The term "antique firearm" is defined at 26 U.S.C. 5845 (g) as follows:

"The term 'antique firearm' means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

It is submitted that the Government has the burden of proof to show that the guns in this case were firearms within the statutory definition as has been set forth above. It is further submitted that the Government wholly failed with respect to any such proof and that nowhere in the record is there any proof whatsoever that the guns in this case met the statutory definition of firearms.

Indeed, the only testimony introduced, which came from the Government's gun expert, on cross-examination, indicated that two of the guns, because of their age might well qualify as antiques (manufactured before 1898). The Government witness testified as follows:

"THE WITNESS: Well, the Parker gun was probably made very likely made before the turn of the century, sometime before 1900. The Parker shotgun. The U.S. Arms Company shotgun (the gun which the defendant CRUZ was charged with selling) is also a very old weapon. It could have been made somewhere around the turn of the century or maybe before 1920. The Winchester model. 308 rifle has probably been made since World War II.

Q. So in respect to the U.S. Arms Company gun, both of those you say was sometimes around the turn of the century, is that correct?

A. That's right, they were probably -- that would be my guess, they were made back around that time. Of course at that time they were legal guns.

Q. There was no registration requirement for them at that time, was there?

A. They were legal guns at that time, no registration was required, they had not been sawed off.

Q. I didn't ask you that. I asked you at the time, was there any registration requirement?

A. No, sir, no."

If anything, and if the burden had not existed before, certainly when the Government's own witness testified that two of the weapons in question could conceivably have been made before the turn of the century, the very time to which the antique statute referred, it became encumbant upon the Government to prove that these weapons were within the ambit of the statute.

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In light of this above testimony, that two of the guns may well have been outside the ambit of the statute because of their age, the Government most definitely had the burden of proof on that issue. The burden of proof was not met. Nowhere in the record is there any testimony to show that these guns come within the purview of this statute. The Government's burden to prove it, beyond a reasonable doubt, was not met.

Moreover, the Trial Court erred in denying the defendant's motion to dismiss the Government's case because of the Government's failure to prove that the guns were covered by the statute (R-295, 405) and the Court further committed reversible error in failing to charge the jury on the issue that they could find that the guns were not covered by the statute because they were antique (R-431).

See U.S. v. Goodson, 439 F.2d 1056 (5th Cir. 1971).

POINT V

THE ALLEGED TRANSFER IN QUESTION
IS EXEMPT UNDER THE STATUTE.

Title 26 U.S.C. 5852(a) provides:

"Any firearm may be transferred to the United States or any department, independent establishment, or agency thereof, without payment of the transfer tax imposed by Section 5811."

Title 26 U.S.C. 5853(a) provides:

"A firearm may be transferred without the payment of the transfer tax imposed by Section 5811 to any State, possession of the United States, any political subdivision thereof, or any official police organization of such a Government entity engaged in criminal investigations."

The guns in question were obviously being transferred to the United States. The Court stated that the Government was the transferee. The firearms were in fact being transferred to a police organization, namely a United States Undercover Agent. Thus, according to the plain meaning of the statute, the transfer was exempt from tax because of the fact that the transfer was being made to the Government as transferee.

While it is true that 26 U.S.C. 5852(f) and 26 U.S.C. 5853(c) provides that the transfer must be pursuant to an application, it was the Government here to whom the gun was being transferred and they had the knowledge of the registration requirement. The Government expert, Mr. Cain, stated that a "transfer" would not be allowed without the registration. So that a consideration of Sections (f) and (c) bring us back to the issues raised at POINT II to the effect that the transfer could not legally have ever taken place under the terms of the statute because the transferee was

not entitled to take possession without registration.

Of course, it is recognized, that it may well be the view of the Court and certainly the view of the Government that this exemption was not intended to cover a purchase by an undercover agent in the course of his performance of his duties, it is respectfully pointed out that while this statute is a highly complicated technical statute embodied in the Internal Revenue Code with little notarity, the Government and the Trial Court has taken the position that no requirement of knowledge of the statute is necessary to sustain a conviction. If this is in fact the case and if this Court is to hold that this statute is absolute and there is no element of willfullness or knowledge of the statute required and if the Court is to strictly construe this statute and say in effect "sale without registration or payment of tax equals guilt" regardless of whether the person in question knew of the existence of the statute and his requirement of registration and payment of tax, then also, this same defendant must receive the technical benefits of the statute in that sale to an under cover agent when working for the Government is an exemption.

Certainly, the intent of the law is to keep firearms out of the hands of those who are not supposed to have firearms or who will use those firearms to commit crimes. Obviously, once the Government agency has purchased the firearms and takes possession and control thereof, they have in fact removed the danger of that firearm to the general public. They have accomplished what the

statute is designed to accomplish which is to take firearms of these kind out of the course of commerce and not to put persons in prison. Any sale to a law enforcement agency or to the United States Government accomplishes that purpose of the statute.

It is respectfully submitted that the draftsmen of this statute may have concluded that it is not the purpose of the Government to increase the prison population by the entrapment of individuals into the sale of firearms when the Government is aware at the time that the transfer is taking place that the seller is committing a crime. Perhaps that is the reasoning behind the exemption in the sale to the Government.

The Trial Court was in error in denying defendant's motion to dismiss on the grounds that the alleged transaction was exempt (R-296).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

AFFIDAVIT OF PERSONAL SERVICE

CATHIE WEITEKAMP, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Howard Beach, N.Y. That on the 23rd day of September, 1974 at Foley Square, New York, N.Y. deponent served the within APPELLANT'S BRIEF

upon United States Attorney by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the United States Attorney therein.

Sworn to before me, this 23rd day of September, 1974

Cathie Weitekamp

Type or Print Name Below Signature

CATHIE WEITEKAMP

BENJAMIN J. COVATTA
Notary Public in and for the State of New York
No. 241498475
Qualified in Kings County
Term Expires March 30, 1975